ABSTRACTS

[Editor's note: The abstracts section contains summaries of recent articles, comments and notes discussing alternative forms of dispute resolution published in law journals not specializing in ADR.]

John B. Bates, Jr., *Using Mediation to Win for Your Client*, 38 No. 2 PRAC. LAW. 23 (1992). Commercial disputes are increasingly being resolved through mediation. Bates summarizes the theory of mediation and discusses the advantages of its use in commercial disputes. The author determines that increased control and participation by clients in mediation result in more satisfied clients and, therefore, better compliance with settlements. The cost benefits of mediation, Bates urges, include the ability to obtain insightful information through informal discussion, which may help to streamline discovery in the event of litigation. He contrasts mediation with other forms of dispute resolution, such as arbitration and court sponsored settlement conferences. These forms of dispute resolution fail to offer the control and participation which make mediation desirable. The author lists tips on choosing a mediator, including suggested precautions the attorney should take in the process. Lastly, the author bolsters the argument for mediation by discussing the benefits of its use to practicing attorneys.

Alfred R. Belinkie, *Matrimonial Arbitration*, 65 CONN. B. J. 309 (1991). Matrimonial arbitration is defined as a voluntary process taking place outside of the traditional judicial system that allows parties the flexibility to select their own 'judge' or panel of 'judges' and to establish procedural and discovery rules unique to their own proceeding. The author contends that judges are frequently seen by those in domestic disputes as not having the time or the training to resolve domestic issues, and that the parties fear the power of a judge with little contact or actual subjective observation to determine the course of their lives. The Connecticut General Statutes Sections 52-408 through 52-424, enacted by the legislature and administered by the Connecticut Superior Court, are analyzed in detail. The author concludes that these statutes are exemplary, should be applied to arbitration agreements in domestic disputes, and are an effective way of accomplishing arbitration's conceptual goal: "to find the best possible remedy to a problem rather than determine guilt or innocence."

Craig M. Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depecage*, 12 NW. J. INT'L L. & BUS. 163 (1991). *Depecage*, the practice of designating different systems of law to apply to different aspects of a dispute in international arbitration, offers many benefits. However, the benefits may be limited by national judicial institutions. In international commercial contracts, the author suggests that many parties needlessly limit their choice of law provisions to either international law, national law, or the law of a single nation. He claims that this limitation is self-imposed, and that it denies the parties the broad benefits of selecting different systems of law to apply to the different aspects of their agreement.

The author demonstrates the importance of choice of laws by comparing United States and German law regarding the substance of an arbitration agreement, the arbitration procedure, and the agreement to arbitrate. On those three issues, the choice of law plays a major role in determining the result. For example, United States law prohibits penalty provisions in contracts while German law allows them; German law generally prohibits cross examination of witnesses while United States law requires cross examination; under German law an agreement to arbitrate must be in a separate writing, while under United States law the agreement to arbitrate may be part of the body of contract. The author argues that although *depecage* may increase negotiation costs and be demanding of the skills of counsel, it provides the contracting parties with flexibility, certainty and a neutral body of laws to govern their agreement. The greatest danger to realizing the benefits of *depecage*, as the author sees it, is the role of the judiciary in pre- and post-arbitration review. For instance, in the United States federal law can pre-empt choice of law provisions when determining whether an arbitrator has exceeded his authority or violated public policy. By failing to give full effect to the parties' choice of laws and by vacating arbitration awards on purely national public policy grounds, national judicial institutions prevent the parties from exercising autonomy and realizing the benefits of *depecage*.

Frank C. Morris, Jr., *Arbitration After* Gilmer, 38 No. 4 PRAC. LAW 71 (1992). The Federal Arbitration Act, 9 U.S.C. § 1, creates a presumption favoring the enforceability of arbitration agreements. The author contends that the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991), assures the significance of arbitration in employer-employee disputes. He discusses the *Gilmer* Court's use of the "vindication test" to expand the F.A.A.'s coverage to statutory claims. Under the "vindication test," the *Gilmer*

Court concluded that the prospective litigant's cause of action through arbitration was vindicated because the statute in question, the A.D.E.A., retained its remedial and deterrent functions. Next, the author examines the precedential effect of *Gilmer* and subsequent decisions on the scope of the F.A.A. He determines that two perspectives exist as to the current scope of F.A.A. § 1. First is the view that the F.A.A. does not cover any contract involving employment. Second is the view that the F.A.A. excludes only employees in the transportation industry, who are expressly mentioned in § 1. The author then presents a list of substantive and procedural suggestions designed to assist management in winning arbitration disputes. He concludes with a brief discussion of other dispute resolution alternatives which may be used when the cost and complexity of arbitration preclude non-union employers from using it.

Carlton J. Snow & Janine C. Pringle, *Should Arbitrators Have the Last Word on "Last Chance" Settlement Agreements?*, 27 WILLAMETTE L. REV. 513 (1991). "Last chance" settlement agreements provide a valuable opportunity for workers under threat of termination to reach a settlement with employers in labor disputes. The drawback is that many last chance settlement agreements include waiver provisions that require employees to waive future appeal rights. The authors contend that these waiver provisions conflict directly with the goal of protecting employee rights through collective bargaining and violate due process requirements under collective bargaining agreements. The authors support their belief that waiver provisions are unenforceable on three grounds: (1) national policy favors arbitration; (2) waivers are inconsistent with collective bargaining agreements; and (3) statistical support for provisions that provide incentive for settlement agreements is lacking. In addition, the authors assert that narrowly drawn last chance settlement agreements (agreements without waiver provisions) are usually upheld by arbitrators and are consistent with the principles of just cause discharge. Thus, the effectiveness of narrowly drawn last chance settlement agreements provides adequate incentive for employers without depriving workers of the protection afforded by appeal procedures. The authors summarize the approaches taken in enforcing waiver provisions by examining the courts, the Merit Systems Protection Board (MSPB), and the Equal Employment Opportunity Commission (EEOC). These established approaches are not binding on the arbitrator because it is the language of the collective bargaining agreement which provides the scope of arbitral authority. The authors suggest, however, that the arbitrator should look to the approach taken by the courts for guidance in analyzing the effectiveness of waivers in last chance settlement agreements and in ascertaining the incentives

behind the agreements themselves. The authors conclude with a recommendation that arbitrators should find waiver provisions in last chance settlement agreements to be void unless they are clearly authorized by the language of the labor contract.

John R. Van Winkle, *Mediation: An Analysis of Indiana's Court-Annexed Mediation Rule*, 25 IND. L. REV. 957 (1992). In order to facilitate the goal of earlier and less costly settlement of civil disputes, the Supreme Court of Indiana adopted Rules for Alternative Dispute Resolution (ADR Court Rules). The author traces the development of the ADR Rules from their contemplation in 1985 to their effective date of January 1, 1992. Throughout his narrative of the evolution of the ADR Court Rules, the author notes the subsequent changes made to the proposed draft and points out the conflicts between various sections of the text that have arisen due to these revisions. In analyzing the specific provisions of the Rules, the author places particular emphasis on the fact that the basic thrust of the Rules went from mandatory arbitration with sanctions of costs and fees to non-binding mediation. He also suggests that the language of the Rules imply an attempt to incorporate the nonadversarial characteristics of mediation into a highly "combative adversarial process" without altering the nature of either method. According to the author, these ad hoc changes in the original proposal of the Rules combined with the difficulty in developing the provisions "from scratch" has lead to the conflicting policies embodied in the text of the final draft. It is with this understanding, contends the author, that the ADR Court Rules should be interpreted and applied.